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November 30, 2005

Via ECFS

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Presentation in WT Docket No. 05-7

Dear Ms. Dortch:

This letter responds to an *ex parte* communication filed on November 22, 2005 by the Association for Maximum Service Television, Inc. ("MSTV") addressing an alleged "incompatibility" between the Administrative Procedure Act ("APA") and the Petition for Declaratory Ruling filed on January 10, 2005 by QUALCOMM Incorporated ("QUALCOMM") in the above-referenced proceeding. MSTV offers three arguments against the Petition; each is a re-hash of points made previously in this docket and each is without solid foundation.

I. Section 27.60 Does Not Preclude Use of the OET-69 Methodology. We turn first to MSTV's argument that Section 27.60 does not contemplate use of the OET-69 methodology in engineering studies to be filed by QUALCOMM pursuant to Section 27.60(b)(1)(iii) of the Commission's rules.[1] MSTV ignores the fact that Section 27.60 does not authorize the use of any specific methodology. Rather, Section 27.60(b)(1)(iii) allows use of an "engineering study" to justify proposed separations between TV/DTV stations and 700 MHz licensees. MSTV argues that because the OET-69 methodology is not "mentioned" in the rule or in the *Orders* adopting the rule, it cannot be used.[2] However, the rule and the *Orders* do not mention *any* type of methodology for an engineering study. Therefore, according to MSTV's logic, no engineering study could be used – an outcome which would make mockery of the rule itself.

MSTV goes on to argue that the APA prohibits the Commission from exercising its discretion to accept engineering studies based on OET-69 because it was developed for DTV-to-DTV interference, implying that it is unsuitable for predicting interference from MediaFLO to TV/DTV stations. However, this argument simply ignores several important facts. First, while it is true the OET-69 was initially developed for analyzing the potential for interference between DTV stations, it has been used by the Commission

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1 MSTV November 22 Letter at pps. 3-5.

2 MSTV November 22 Letter at p. 5.

and the broadcast industry for many years to analyze interference between analog and DTV stations alike.[3] The use of the OET-69 methodology and the associated software is in no way limited to only DTV-to-DTV station interference. They can be used to analyze other interference situations as appropriate. Second, MSTV ignores the fact that, from an interference perspective, the MediaFLO waveform has common characteristics with the ATSC DTV waveform.[4] Both are digital "noise like" technologies that are deployed in the same 6 MHz bandwidth and both are employed in transmit-only systems.[5] These common characteristics make it entirely appropriate to use OET-69 to analyze the potential for interference to TV/DTV stations from MediaFLO.

It is consistent with the APA for the Commission to interpret its rules by deciding that the phrase "engineering study" in Section 27.60 (b)(1)(iii) includes engineering studies based on OET-69, in light of QUALCOMM's Petition and its other submissions about MediaFLO and its proposed use of OET-69. As QUALCOMM has shown in prior filings, the APA permits the Commission to issue a declaratory ruling to interpret a vague rule—to provide a "crisper and more detailed" understanding of such a rule.[6] Here, the rule in question, Section 27.60(b)(1)(iii), is vague in that it uses the term "engineering study" without specifying the permitted methodology or methodologies to be used in such a study. This is a textbook case for issuance of a declaratory ruling.

QUALCOMM, and others supporting the Petition, have provided both evidence and argument showing that OET-69 is an acceptable predictor of interference from MediaFLO. Throughout this proceeding, MSTV has never suggested any alternative methodology. The Commission should dismiss MSTV's latest arguments, which are merely an attempt to further delay this proceeding and maintain the status quo, and rule on QUALCOMM's Petition expeditiously. Further delay will unnecessarily inhibit the use of the 700 MHz band for MediaFLO.

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3 *See, e.g., Amendments of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Low Power Television, and Television Booster Stations, and to Amend Rules for Class A Digital Class A Television Stations*, 18 FCC Rcd 18365, 18386 (2003) ("Our DTV prediction methods have been used for several years in the processing of applications for DTV and NTSC TV facilities."); *In the Matter of Amendment of Section 73.622 (a), Green Bay, WI,* 19 FCC Rcd 19719, 19720-21 (Vid. Svcs. Div. 2004); *In the Matter of Amendment of Section 73.622, Albany, NY,* 19 FCC Rcd 4329, 4331 (Vid. Svcs. Div. 2004).

4 QUALCOMM March 25 Reply Comments at p. 9.

5 *Id. See also* QUALCOMM January 10 Petition for Declaratory Ruling at pps. 14-15.

6 *See USTA v. FCC*, 400 F. 3d 39 (D.C. Circuit 2005), citing *American Mining Congress v. Mine Safety & Health Administration*, 995 F. 2d. 1106 (D.C. Cir. 1993). See also QUALCOMM March 25 Reply Comments at pps. 4-6.

II. The Language and Structure of Section 27.60 Do Not Support A "No New Interference" Standard. Second, we turn to MSTV's argument that the standard for interference protection under Section 27.60 is "none."[7] MSTV claims that Section 27.60 is a classic "go/no-go" rule that is not at all vague and requires no interpretation. Therefore, according to MSTV, an interpretation of the rule allowing *de minimis* interference would constitute a constructive amendment, requiring a notice and comment rulemaking.[8] Once again, MSTV disregards the language and structure of Section 27.60 in making this argument. In fact, both the language of Section 27.60 and its structure demonstrate that it does not impose a "no interference" standard. Instead, the language and structure of the rule show that the portion of the rule allowing 700 MHz licensees to file engineering studies "justifying the proposed separations" is vague in that it does not explain what kind of justification would or would not be acceptable. Further, the language and structure show that the Commission has the discretion to interpret the rule as permitting engineering studies showing some *de minimis* level of interference from MediaFLO to a TV or DTV station. Accordingly, it is entirely consistent with the APA for the Commission to interpret the rule as deeming engineering studies to have presented sufficient justification if they show that QUALCOMM would potentially cause over-the-air interference to a *de minimis* number of people, who live in a limited area in a limited number of markets, when watching a particular station for a limited period of time, in light of the millions and millions of people who would be able to receive MediaFLO.

We start with the language of the rule, which simply does not say that the standard is "no interference". Rather, the preamble to the rule states that 700 MHz licensees are to operate in accordance with the rule "to reduce the potential for interference to public reception of the signals of existing TV and DTV broadcast stations. . ."[9] The Commission could easily have written a rule saying that the level of interference permitted is "none," as MSTV would have it. The rule simply does not say that. It does not require QUALCOMM to eliminate all interference or to operate without causing any interference. Rather, QUALCOMM is required merely to "reduce the

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7 MSTV November 22 Letter at pps. 3-5.

8 MSTV cites *National Family Planning and Reproductive Health Association, Inc. v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992), a case that is nothing like the instant case. There, the Court of Appeals held that the when an agency adopts a rule and announces its meaning as clear and definitive to the public and the Supreme Court, it may not repudiate that meaning without amending the rule by notice and comment rulemaking. Here, the Commission has never announced the meaning of Section 27.60(b)(1)(iii). The Commission would not have to repudiate anything to grant QUALCOMM's Petition.

9 47 CFR §27.60.

potential" for causing interference. On this basis alone, the Commission should reject MSTV's argument.

Furthermore, the structure of Section 27.60 belies MSTV's argument. MSTV claims that Section 27.60 (a) sets forth the TV/DTV protection requirements, and that Section 27.60(b) sets forth four methods by which a 700 MHz licensee (an "entrant" in MSTV's words) can show that its operations will meet the TV/DTV protection requirements.[10] But, this argument simply ignores what the prongs of Section 27.60(b) actually say. For example, Section 27.60(b)(1)(iv) is not a method for QUALCOMM to show that it will meet the requirements of Section 27.60(a). Rather, Section 27.60(b)(1)(iv) provides that QUALCOMM may begin operations if it has the written concurrence of TV/DTV station(s). Certainly, if the rule imposed a "zero interference" standard, QUALCOMM would not be permitted to reach agreements with stations whereby QUALCOMM would cause interference, and, likewise, a station would not be permitted to agree to accept interference from QUALCOMM. Moreover, this prong of the rule does not entail QUALCOMM meeting the protection requirements—the so-called D/U ratios—in Section 27.60(a). The whole point of this prong is to allow a licensee such as QUALCOMM to go on the air despite the fact that it does not meet the D/U ratios in Section 27.60(a).

Likewise, MSTV's argument fails in light of Sections 27.60(b)(1)(i) and (ii). Section 27.60(b)(1)(i) allows a 700 MHz licensee to go on the air by utilizing geographic separation tables in Part 90 of the Commission's rules. These tables make no reference to the D/U ratios in Section 27.60(a). Section 27.60(b)(1)(ii) provides that if the station parameters are greater than those indicated in the Part 90 tables, the licensee can calculate the geographic separations in accordance with the D/U ratios in Section 27.60(a). If Section 27.60(b) merely supplies four methods for meeting the Section 27.60 (a) requirements, as MSTV claims, there would be no reason for the Commission to adopt Section 27.60(b)(1)(i) and allow use of the Part 90 tables. There would only be a prong allowing separations based on the Section 27.60(a) D/U ratios. MSTV argument fails to provide a sensible reason for the Commission to have adopted Section 27.60(b)(1)(i), which has nothing to do with the Section 27.60(a) D/U ratios.

Finally, MSTV's interpretation of Section 27.60 is completely at odds with the language at the beginning of Section 27.60(b)(1), which subjects showings under that section to "Commission approval." There would be no need for Commission approval if "zero interference" were the standard and the four methods of Section 27.60(b) merely ways of demonstrating no interference.

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[10] MSTV November 22 Letter at pps. 3-4.

Both the language and the structure of Section 27.60 establish that there is no "zero interference" rule. Therefore, the APA does not prohibit the Commission from interpreting the rule to allow a 700 MHz licensee such as QUALCOMM to file an engineering study "justifying the proposed separations" to include a *de minimis* level of interference. QUALCOMM believes that the rule allows the Commission this discretion. MSTV does not. The very fact that QUALCOMM and MSTV can have such differing views of the Commission's rule underscores the need for interpretation pursuant to the Petition for Declaratory Ruling.

It should be noted that this is not the first time that MSTV has made this "no new interference" argument. At least three times before, the Commission has rejected MSTV's attempts to force a "zero interference" policy on the Commission.[11] In response to an MSTV Petition for Reconsideration in connection with 700 MHz band-clearing agreements, the Commission found an intent to minimize the possibility of interference, "not to impose stringent 'no new interference' requirements."[12] The particular context of these attempts by MSTV to straitjacket the Commission was different, but the point is the same: MSTV would deny the Commission the flexibility to allow a minimal amount of interference for the public good. This should not be tolerated. For all of these reasons, the APA does not prohibit the Commission from granting QUALCOMM's requested declaratory ruling.

III. Grant of QUALCOMM's Petition Does Not Require A Formal Rulemaking Proceeding. Finally, we turn to MSTV's argument that streamlined procedures would substantively alter parties' rights and that, therefore, adoption of such procedures requires a notice and comment procedure under the APA.[13] It appears that MSTV objects both to a 14-day notice period and to the establishment of a rebuttable presumption.

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[11] *See Service Rules for the 746-764 and 776-794 MHz Bands and Revisions to Part 27 of the Commission's Rules; Carriage of the Transmission of Digital Television Broadcast Stations, Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 18 FCC Rcd 23308, 23311 (2003).

[12] *Id.*

[13] MSTV November 22 Letter at p. 2. In this discussion, as in others involving so-called "notice and comment" proceedings under the APA, it should be remembered that the Section 553 rulemaking process requires publication in the Federal Register. After issuance of a Public Notice, MSTV and its members have made over 25 filings in this proceeding. Now, some eleven months after the Petition was filed, it would be unconscionable to delay the public the benefits of MediaFLO so that MSTV and its members can make the same filings in response to a Notice of Proposed Rule Making.

With regard to the latter, the rebuttable presumption adopted by the Commission in the *Upper 700 MHz Reconsideration Order* and cited by QUALCOMM in its Petition, did not run the gamut of procedural obstacles that MSTV would put in the Commission's way in this case.[14] There, the Commission, on reconsideration of service rules for the Upper 700 MHz bands, decided – without any prior notice in the Federal Register – to adopt such a presumption for voluntary band clearing agreements. Clearly, the Commission believed that such matters were "on the procedural end of the spectrum" and therefore permitted by the exception to the "notice and comment" requirement found in Section 553(b)(3)(A) of the APA.

Moreover, contrary to MSTV's arguments, QUALCOMM is not asking the FCC to adopt a new standard for judging engineering studies or improperly shift the burden of proof under the guise of streamlined procedures. Rather, as explained in the prior section, QUALCOMM is asking the FCC to interpret the vague provision in Section 27.60(b)(1)(iii) as providing that an engineering study showing that QUALCOMM would not exceed a ***de minimis*** level of interference presents an acceptable justification. The Commission would apply that substantive standard, established via interpretation of the rule, to QUALCOMM's applications. If QUALCOMM makes a submission that meets that standard, thereby meeting its burden, an objecting TV station, like any party filing a Petition to Deny, has to show why a grant of QUALCOMM's submission would be contrary to the public interest. Thus, MSTV's attempt to distinguish *JEM Broadcasting Co., Inc v. FCC*, 22 F.3d 320 (D.C. Circuit 1994), is unavailing. As in *JEM Broadcasting*, the FCC would not be establishing new substantive standards by streamlining the processing of QUALCOMM's engineering studies.

As to QUALCOMM's proposal for a 14-day notice period, MSTV cannot deny that under *JEM Broadcasting,* and *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295 (D.C. Cir 1983), the Commission has legal authority to set abbreviated procedural deadlines to streamline the application process.[15] Thus, MSTV's letter boils down to an argument between the 14-day period advocated by QUALCOMM to expedite the initiation of

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[14] *Service Rules for the 746-764 and 776-794 MHz Bands and Revisions to Part 27 of the Commission's Rules; Carriage of the Transmissions of Digital Television Broadcast Stations; Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 18 FCC Rcd 20845, 20870 (2000).

[15] Indeed, MSTV ignores the statement in *Lamoille Valley* that an agency has "ample discretion to structure its proceedings as it sees fit." 711 F.2d at 328. That discretion is abused only if the agency creates "extreme procedural hurdles that foreclose fair consideration of the underlying controversy." *Id.* As set forth *infra*, a grant of QUALCOMM's proposed streamlining will not establish any extreme procedural hurdle that would foreclose fair consideration of any underlying controversy.

MediaFLO or the 30-day period given in Section 1.903 of the Commission's rules for a wide variety of applications, for which there is often no need for expedition. The provision in the APA allowing the FCC to adopt rules of procedure without going through a notice and comment rulemaking, Section 553(b)(3)(A), allows the FCC to employ the 14-day period to streamline its processes and expedite the provision of the MediaFLO to the public. Moreover, the 16-day difference is not as great as MSTV pretends. As a practical matter any affected station would have a great deal more than 14 days notice. First, Section 27.50(c)(ii)(5) requires a 90-day notice period when a 700 MHz licensee proposes operations at a power level greater than 1kW. Second, QUALCOMM will likely coordinate with any affected station on developing the OET-69 study and will certainly discuss issues in an attempt to "reduce any potential for interference." Further, QUALCOMM will provide notice to the broadcaster at the time of the filing, rather than at the time of the Public Notice, as would normally be the case. This could add as much as a week to the amount of time a station may have to file a response. In any case, the substantive rights of the broadcasters are not substantially altered by adoption of streamlined processing because any affected station will still have an ample opportunity to object to QUALCOMM's filing.

In sum, MSTV has failed to show any incompatibility with the Administrative Procedure Act. Instead, by re-hashing old arguments, MSTV shows that it is interested only in obstructionism. In fact, the main argument raised by MSTV in this proceeding – the sanctity of "free TV" – is shown to be hollow by QUALCOMM's filings in this proceeding. We have demonstrated that a grant of the Petition will allow QUALCOMM to deliver the benefits of the highly innovative MediaFLO service to millions and millions of people, while causing potential over-the-air interference to a very limited number of people in a limited number of markets in limited geographic areas and only for a limited period of time. In our judgment, there is no doubt where the public interest lies.

Respectfully submitted,

/s/ Dean R. Brenner

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